

Agent Orange: The States Fight Back

JOHN J. KULEWICZ*

The Agent Orange controversy recently has produced an ironic statutory phenomenon. Although the dispute stems from military use of Agent Orange by the federal government, it is the state legislatures that have responded most aggressively on behalf of concerned veterans. In contrast to the desultory reaction of the federal government, nearly one-third of the states have, since 1980, enacted programs to identify health disorders caused by Agent Orange.¹ This Article examines those state programs and recommends additional measures to better effectuate their intent.

I. THE AGENT ORANGE CONTROVERSY

The Agent Orange controversy developed from tactical use of phenoxy herbicides during the Vietnam campaign. The phenoxy herbicides are acidic compounds that kill plants by causing selective malfunctions in growth processes.² Comprised of equal portions of 2,4-dichlorophenoxyacetic acid (2,4-D) and 2,4,5-trichlorophenoxyacetic acid (2,4,5-T), phenoxy herbicides form the contaminant 2,3,7,8-tetrachlorodibenzo-p-dioxin (TCDD) under certain conditions of synthesis.³ The dioxin TCDD is reputed to be "one of the most toxic chemicals known to

* B.A., Ohio State University 1976; J.D., Yale Law School 1979. Admitted to Ohio Bar 1980.

1. See *infra* text accompanying notes 14-17. Fifteen states have responded legislatively to the Agent Orange controversy. They are: California, Georgia, Hawaii, Illinois, Kansas, Minnesota, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Texas, Washington, and West Virginia. See CAL. MIL. & VET. CODE § 698 (West Supp. 1983); GA. CODE § 31-30-1 to -9 (Supp. 1982); HAWAII REV. STAT. § 321-261 to -271 (Supp. 1982); ILL. REV. STAT. ch. 126-1/2, § 101-108 (Supp. 1982); KAN. STAT. ANN. § 73-1701 to -1709 (Supp. 1982); MINN. STAT. § 196.19-.26 (Supp. 1983); Act of Feb. 21, 1980, ch. 443, 1979 N.J. Laws 1667; N.Y. CIV. PRAC. LAW § 214-b (McKinney Supp. 1982); N.Y. PUB. HEALTH LAW § 2475 (McKinney Supp. 1982); OHIO REV. CODE ANN. §§ 123.024, 2305.10, 5903.21-.26 (Page Supp. 1982); OKLA. STAT. tit. 72, § 350-358 (Supp. 1982); 51 PA. CONS. STAT. § 20171-82 (Supp. 1983); R.I. GEN. LAWS § 9-1-14.2 (Supp. 1982); TEX. STAT. ANN. art. 4447w (Vernon Supp. 1982); Act of March 31, 1982, ch. 97, 1982 Wash. Laws 461; W. VA. CODE § 16-28-1 to -10 (Supp. 1982).

2. See Lacey & Lacey, *Agent Orange: Government Responsibility for the Military Use of Phenoxy Herbicides*, 3 J. LEGAL MED. 137, 142 n.20 (1982) [hereinafter cited as Lacey & Lacey] (Agent Orange is classified as a "systemic herbicide" absorbed by plants which "serves as a growth regulator, and interferes with growth processes such as photosynthesis, eventually killing the plant"); Citizens Against Toxic Sprays, Inc. v. Bergland, 428 F. Supp. 908, 913 (D. Or. 1977) (phenoxy herbicides "are related to naturally-occurring plant growth regulators [and] kill plants by causing malfunctions in growth processes").

3. See generally American Medical Association, *The Health Effects of "Agent Orange" and Polychlorinated Dioxin Contaminants* 1, 27 (1981) [hereinafter cited as AMA, *Health Effects of "Agent Orange"*]; (describing Agent Orange as

a 50:50 mixture of the n-butyl esters of 2,4-dichlorophenoxyacetic acid (2,4-D) and 2,4,5-trichlorophenoxyacetic acid (2,4,5-T), together with a minor amount of the free acid 2,4,5-T (1% of the total mixture) and varying amounts (from 0.02 to 15 ppm, or a weighted mean of 1.98 ppm) of the contaminant 2,3,7,8-tetrachlorodibenzo-p-dioxin (TCDD). . . . TCDD may form as a by-product in the synthesis of 2,4,5-trichlorophenol (a precursor of 2,4,5-T), particularly if the alkaline reaction mixture is allowed to rise uncontrollably beyond 180°C. . . . [but] 2,4-D, a phenoxy herbicide closely related to 2,4,5-T, is not normally contaminated with TCDD.)

Courts have recognized dioxin as "any chemical composed of a pair of benzene rings connected by two oxygen bonds" and have found that "[t]here are many distinct types of dioxin, and separate isomers of each type." United States v. Vertac Chemical Corp., 489 F. Supp. 870, 874 n.5 (E.D. Ark. 1980).

man."⁴ Agent Orange, which gained its name from the orange-striped drums in which it was shipped to the war zone, is a phenoxy herbicide that contains the dioxin TCDD.⁵

The United States used phenoxy herbicides to defoliate suspected Viet Cong bases.⁶ In the course of Operation Ranch Hand, United States armed forces reportedly sprayed over ten million gallons of dioxin-tainted Agent Orange in Southeast Asia between 1962 and 1972.⁷ Use of Agent Orange peaked between 1967 and 1969.⁸ Phenoxy herbicides known as Agent Green, Agent Pink, Agent Purple, and Herbicide Orange II, which also contained dioxin, were deployed in lesser quantities.⁹ The number of Americans exposed in Indochina to the dioxin in Agent Orange and other herbicides may exceed two million.¹⁰

The extensive military use of Agent Orange during the Vietnam War has caused growing alarm over its potential health consequences. Tests indicate a causal relationship between excessive dioxin exposure and impaired liver function, chloracne, nephropathy, gastrointestinal irritation, myopathy, depression, and irritation of the central nervous system.¹¹ Experimental results also provide a basis to suspect that dioxin may induce cancer and genetic mutation.¹² This data is especially relevant to Vietnam veterans: Agent Orange had an alleged average dioxin content that was one hundred times greater than that of phenoxy herbicides in domestic use.¹³

Veterans have sought in vain to win federal recognition of a relationship between Agent Orange exposure and subsequent health defects. The Veterans Administration has disclaimed a scientific basis upon which to grant health care benefits to dioxin-exposed veterans.¹⁴ The congressional response has been only slightly more

4. *Citizens Against Toxic Sprays, Inc. v. Bergland*, 428 F. Supp. 908, 914 (D. Or. 1977). See AMA, *Health Effects of "Agent Orange"*, *supra* note 3, at iii (TCDD "may well be one of the most toxic substances known to man"); Lacey & Lacey, *supra* note 2, at 145 ("TCDD is frequently referred to as undisputably the most toxic substance known to man").

5. See generally AMA, *Health Effects of "Agent Orange,"* *supra* note 3, at 1-4; Lacey & Lacey, *supra* note 2, at 140.

6. See *United States v. Vertac Chemical Corp.*, 489 F. Supp. 870, 874 (E.D. Ark. 1980) (Agent Orange is a defoliant "that was used widely by the United States government to clear jungle undergrowth in Vietnam."); Lacey & Lacey, *supra* note 2, at 141-42 (Agent Orange was most effective "in defoliating mangrove forests and broadleaf crops (beans, peanuts, ramie, and root or tuber crops), as well as eliminating brush covers around basecamp perimeters, cache sites, waterways, and communication routes"); Fair, *No Place to Hide: How Defoliants Expose the Viet Cong*, 14 ARMY 54 (1963); Pfeiffer & Orians, *The Military Uses of Herbicides in Vietnam*, in *HARVEST OF DEATH: CHEMICAL WARFARE IN VIETNAM AND CAMBODIA* (1972).

7. Lacey & Lacey, *supra* note 2, at 140-41 (10,646,000 gallons of Agent Orange were used in the course of Operation Ranch Hand). In addition, the United States military sprayed dioxin-contaminated herbicides known as Agent Green, Agent Pink, Agent Purple, and Herbicide Orange II to defoliate suspected Viet Cong bases. See AMA, *Health Effects of "Agent Orange"*, *supra* note 3, at 1.

8. Lacey & Lacey, *supra* note 2, at 141; Pfeiffer & Orians, *supra* note 6, at 120.

9. Lacey & Lacey, *supra* note 2, at 140; AMA, *Health Effects of "Agent Orange"*, *supra* note 3, at 1.

10. See AMA, *Health Effects of "Agent Orange"*, *supra* note 3, at 3 (approximately 2.4 million Vietnam veterans were exposed to Agent Orange); Wilber, *Agent Orange & Dioxin: Do 2.4 Million Plaintiffs Have a Cause of Action?* 22 TRAUMA 1:13, 1:23 (1980).

11. AMA, *Health Effects of "Agent Orange"*, *supra* note 3, at 3, 27.

12. *Id.* at 27.

13. *Id.*

14. See, e.g., *Agent Orange Bill Opposed by Agency*, N.Y. Times, Apr. 27, 1983, at A-23, col. 1. The Veterans Administration likewise has allowed nearly four years to pass between legislative enactment and administrative implementation of an epidemiological study measure entitled the Veterans Health Programs Extension and Improvement Act

sympathetic. Congress has commissioned an epidemiological study¹⁵ and, during a one-year period, allowed hospital or nursing home care to veterans who suspected that they were suffering from dioxin damage.¹⁶ In the meantime, the sovereign immunity doctrine has frustrated litigative efforts of veterans and their dependents to recover damages from the federal government.¹⁷ For ailing members of the Vietnam expedition, the legacy of Agent Orange is one of apprehension unredressed by the federal government.

of 1979, 38 U.S.C. § 219(a)(1)(A) (1981). See *Statement Before the Subcomm. on Oversight and Investigations of the House Comm. on Veterans Affairs*, 98th Cong., 1st Sess. (May 3, 1983) at 10-11 (Donald L. Custis, M.D., Chief Medical Director, Department of Medicine and Surgery, Veterans Administration) [hereinafter cited as Custis Statement]. Indeed, the epidemiological study has not yet been started, and has been transferred to the Center for Disease Control. *Id.* at 11. The study is not expected to be completed until September 30, 1987. *Id.*

15. In 1979, Congress ordered the Administrator of Veterans' Affairs to design a protocol for and to conduct an epidemiological study of any adverse health effects that use of phenoxy herbicides during the Vietnam conflict might have caused. See Veterans Health Programs Extension and Improvement Act of 1979, 38 U.S.C. § 219 (Supp. V 1981). The study presently is being conducted at the Center for Disease Control. See Custis Statement, *supra* note 14, at 10-11. The law also mandated that the Administrator report to the Congress on the progress of the study. Veterans Health Programs Extension and Improvement Act of 1979, 38 U.S.C. § 219(b) (1981).

16. In 1981, Congress enacted a short-term Agent Orange health care program as part of the Veterans Health Care, Training, and Small Business Loan Act of 1981, 38 U.S.C. § 610(e)(1) (Supp V 1981). The program enables the Veterans Affairs Administrator to furnish for one year hospital or nursing home care to veterans who suspect dioxin damages. 38 U.S.C. § 610(e)(1)(A) & (B)(3) (Supp. V 1981). Only 9,400 out of 369,000 veteran applicants have been afforded such care on an in-patient basis. Custis Statement, *supra* note 14, at 6.

The 98th Congress is considering H.R. 1961, which, as amended on July 28, 1983, by the Subcommittee on Compensation, Pension, and Insurance of the House Veterans Affairs Committee, would allow compensation to Vietnam veterans suffering from soft tissue sarcoma, prophyria cutanea tarda, and chloracne on the basis that these diseases "may be attributable to exposure to Agent Orange, notwithstanding that there is insufficient medical evidence to conclude that such diseases are service-connected." H.R. 1961, 98th Cong., 1st Sess. § 2 (1983). Thus, the bill would provide benefits to Vietnam veterans independent of any proven connection between dioxin exposure and health disorders.

17. At the time that the state governments entered the Agent Orange fray, a massive class action was being litigated, in which numerous Vietnam veterans and their dependents sought tort recoveries for alleged personal injuries caused by their exposure to Agent Orange. See *In re "Agent Orange" Product Liability Litigation*, 635 F.2d 987 (2d Cir. 1980), *rev'g*, 506 F. Supp. 737 (E.D.N.Y. 1979), *cert. denied*, 454 U.S. 1128 (1981); 534 F. Supp. 1046 (E.D.N.Y. 1982); 91 F.R.D. 618 (E.D.N.Y. 1981); 506 F. Supp. 762 (E.D.N.Y. 1980); 506 F. Supp. 757 (E.D.N.Y. 1980); 506 F. Supp. 756 (E.D.N.Y. 1980); 506 F. Supp. 754 (E.D.N.Y. 1980); 506 F. Supp. 753 (E.D.N.Y. 1980); 506 F. Supp. 750 (E.D.N.Y. 1980); 475 F. Supp. 928 (E.D.N.Y. 1979). Recovery against the federal government by veterans and their dependents thus far has been barred, however, by the doctrine of sovereign immunity, on the basis of which the judiciary has dismissed claims against the federal government. See *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762, 769-82 (E.D.N.Y. 1980) (dismissing third-party claims of alleged Agent Orange manufacturers against United States government on grounds of sovereign immunity). See also *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 673 (1977) (three considerations underlie sovereign immunity from actions for service-connected injuries: the federal nature of armed service, "no fault" compensation plan of the Veterans Benefit Act, and the soldier-officer relationship); *Feres v. United States*, 340 U.S. 135, 146 (1950) ("Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service"); *Lombard v. United States*, 690 F.2d 215, 218-20 (D.C. Cir. 1982) (Federal Tort Claims Act did not waive sovereign immunity of United States government with respect to injuries sustained by servicemen while on active duty); *Coffey v. Department of Defense*, 518 F. Supp. 726, 727 (D.D.C. 1981) (intra-military immunity principle bars suits based on injuries incurred in the course of military service); *Everett v. United States*, 492 F. Supp. 318, 320-22 (S.D. Ohio 1980) (*Feres* and *Stencel* doctrines bar actions against government to recover for torts "arising out of or incident to military service"). See generally Comment, *Duty to Warn as an Inroad to the Feres Doctrine: A Theory of Tort Recovery for the Veteran*, 43 Ohio St. L.J. 267 (1982).

Judicial involvement in the Agent Orange controversy has focused instead on the class claims against alleged manufacturers of the herbicide. See generally *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762 (E.D.N.Y. 1980). The manufacturers have sought to invoke the government-contractor defense. See generally *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940). The government-contractor defense would exempt the manufacturers from liability upon a showing that the government designed the Agent Orange specifications, that the manufacturer produced Agent Orange in accordance with those specifications, and that the manufacturer had no better knowledge of any health hazards than did the government. See *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762, 792-93 (E.D.N.Y. 1980).

II. STATE INVESTIGATIVE PROGRAMS

Fifteen state governments now have undertaken efforts to investigate Agent Orange health effects.¹⁸ These state research efforts include collection of health data from veterans, epidemiological study of exposed veterans, education programs, genetic counseling, and state involvement in class actions to obtain exposure data.¹⁹ The statutory basis for such programs differs from state to state. In many states, a meaningful assessment of Agent Orange health effects will require the enactment of additional measures.

A. Legislative Presumptions Regarding Agent Orange Health Effects

As a preface to their Agent Orange laws, several legislatures have expressed their concern for the undiagnosed plight of exposed persons. Explicit legislative presumptions, however, threaten the credibility of several state Agent Orange investigations. Notwithstanding their general emphasis on research, many states have based their involvement in the Agent Orange controversy on legislative determinations that dioxin exposure causes health disorders. The finding of the New Jersey legislature that Agent Orange is a "debilitating defoliant" reflects this bias.²⁰ The New York legislature likewise found that "there is credible scientific evidence that exposure to these toxic substances has caused serious physical disabilities."²¹ These assumptions may prejudice and ultimately discredit the data that the research programs develop.

Unassuming statements of legislative purpose comport more closely with the avowed aim of the state Agent Orange laws. California, for example, qualified its statutory preface with the disclaimer that "[n]othing in this act shall constitute a finding, determination, or presumption . . . of any causal relationship between exposure to Agent Orange or any other herbicide and alleged health problems of Vietnam veterans."²² Similarly, Minnesota based its program on the neutral premise that Vietnam veterans "may have suffered adverse health conditions as a result of possible exposure to these chemical agents."²³ By thus reserving their judgment, state lawmakers create a more authoritative context for Agent Orange initiatives.

18. See *supra* note 1.

19. See *infra* text accompanying notes 69-78, 87-92, 125-39 & 147-51.

20. Act of Feb. 21, 1980, ch. 443, 1979 N.J. Laws 1667, § 2.

21. N.Y. CIV. PRAC. LAW § 214-b (McKinney Supp. 1982). Other legislatures have expressed similar conclusions as the basis for their Agent Orange initiatives. See, e.g., Agent Orange Study Act § 2, ILL. REV. STAT. ch. 126-1/2, § 102 (Supp. 1982) (a "large number of Vietnam era veterans were exposed to Agent Orange and other debilitating defoliants during their service in Vietnam and . . . it is a legitimate concern and responsibility of the State to study the possibility of injury").

22. CAL. MIL. & VET. CODE § 698 (West Supp. 1983). The California legislature likewise found that "it is a legitimate concern and responsibility of the State . . . to establish an outreach program to identify those Vietnam veterans who have potential health risks and existing health problems claimed to result from their exposure to Agent Orange or other defoliants and to provide support services to these veterans." *Id.*

23. MINN. STAT. § 196.20 (Supp. 1983):

A large number of Vietnam era veterans were exposed to dioxin or other toxic substances found in certain defoliants, herbicides, pesticides, and similar chemical substances while serving in the armed forces of the United States [and] [i]t is a legitimate concern and responsibility of the state to provide information, referral, and counseling services to those veterans who may have suffered adverse health conditions as a result of possible exposure to these chemical agents.

B. Classification Problems

Two classifications are common to most of the state Agent Orange laws: the definition of the exposed class, and the definition of the toxic substance. These classifications define the scope of the Agent Orange efforts. The definitions adopted by several states may significantly underestimate the extent of the Agent Orange problem.

1. Exposed Class

The statutory definition of the exposed class determines the availability of genetic counseling, representation by the attorney general in suits to obtain dioxin-exposure data, and special statutory limitations periods. The definition also determines the population from which the state will collect health information. In defining the exposed class, the states generally have focused on veterans. In their use and definition of the term "veteran," however, several states have adopted unduly narrow classifications that have excluded many exposed persons from the Agent Orange programs.

Restriction of the Agent Orange programs to veterans overlooks the wartime exposure of many civilians. In all but two of the states that have adopted Agent Orange laws, military service is a prerequisite to eligibility for benefits of the program.²⁴ Yet, many civilians may have been exposed to Agent Orange while serving the public interest in Southeast Asia. Numerous journalists, businessmen, and non-uniformed government officials, for example, traveled in Indochina during the war. Valuable data could be collected from these persons, whose exposure to dioxin and whose utility to the nation were not necessarily less than that of the armed forces. If the states find a nexus between Agent Orange and adverse health effects, moreover, these persons would be no less concerned than former military personnel. Nevertheless, the military service requirement excludes these persons from statutory coverage.

24. Six states have restricted their programs to persons "who served in Vietnam, Cambodia, or Laos during the Vietnam Conflict." GA. CODE § 31-30-1(2) (Supp. 1982). *See also* KAN. STAT. ANN. § 73-1701(1) (Supp. 1982); OHIO REV. CODE ANN. § 5903.21(A)(4) (Page Supp. 1982); OKLA. STAT. tit. 72, § 350(1) (Supp. 1982); TEX. STAT. ANN. art. 4447, § 1(1) (Vernon Supp. 1982); W. VA. CODE § 16-28-1(1) (Supp. 1982). Two states are even more specific, extending special statutory limitations periods to "member[s] of the armed forces of the United States in Indo-China from January first, nineteen hundred sixty-two through May seventh, nineteen hundred seventy-five," N.Y. CIV. PRAC. LAW § 214-b (McKinney Supp. 1982), and "member[s] of the armed forces of the United States in Indo-China from January first, nineteen hundred sixty-two through March twenty-ninth, nineteen hundred seventy-three." R.I. GEN. LAWS § 9-1-14.2 (Supp. 1983). *Cf.* 51 PA. CONS. STAT. § 20172 (Supp. 1983) (requiring military service "during the years 1961-1972"). The California statute, which lacks an explicit definition, speaks simply in terms of "Vietnam veterans." CAL. MIL. & VET. CODE § 698(a) (West Supp. 1983). Illinois and New Jersey, although referring in their statutes to "service in Vietnam," use the otherwise undefined terms "Vietnam era veterans" in defining the class advantaged by their enactments. *See* Agent Orange Study Act §§ 2-4, ILL. REV. STAT. ch. 126-1/2, §§ 102 ("a large number of Vietnam era veterans were exposed to Agent Orange and other debilitating defoliants during their service in Vietnam . . ."), 103 (three members of Agent Orange Study Commission "shall be Vietnam-era veterans"), 104 (study commission shall research Agent Orange effects "on Vietnam era veterans"); Act of Feb. 21, 1980, ch. 443, 1979 N.J. Laws 1667, ¶ 2 ("a large number of Vietnam era veterans were exposed to Agent Orange and other debilitating defoliants during their service in Vietnam and . . . it is . . . [the] responsibility of the State . . . to provide support and counseling to these veterans"), 3 (four members of Agent Orange Commission "shall be Vietnam era veterans"), 4 (Agent Orange Commission shall study Agent Orange effects "on Vietnam era veterans" and coordinate assistance "to these veterans"). Minnesota likewise has adopted a non-Vietnam-specific definition of the term "veteran." *See* MINN. STAT. § 196.21 (Subd. 1) (Supp. 1983) (a "veteran" is a person "who served in the armed forces of the United States of America during the Vietnam era").

Hawaii and New York alone have accommodated this concern. The Hawaii statute covers not only veterans but also "exposed residents."²⁵ An "exposed resident," according to the Hawaii statute, is any present resident of Hawaii "who was in Vietnam, Cambodia, or Laos during the Vietnam conflict for whatever reason."²⁶ A "veteran" is defined redundantly as any resident "who served in Vietnam, Cambodia, or Laos during the Vietnam conflict."²⁷ New York law establishes an even broader dioxin exposure program that includes "employees of the public and private sectors within the state who were exposed to an herbicide containing dioxin"²⁸ and other "residents of the state of New York"²⁹ among its beneficiaries. The coverage of the Hawaii and New York laws is coextensive with possible exposure to Agent Orange.

The military service definitions adopted by other states may even exclude some exposed veterans. Ohio law, for example, requires receipt of "the Vietnam Service Medal for service in Vietnam, Cambodia, Thailand, or Laos during the Vietnam Conflict, as verified by the United States department of defense service form number 214" to qualify as a "veteran" covered by its program.³⁰ This condition excludes exposed veterans whose presence in Vietnam was not sufficiently long or combative to qualify them for the service medal.³¹

Furthermore, the state definitions of exposed persons generally overlook the deceased. Despite the concern that exposure to Agent Orange can have lethal consequences, the states have not provided for inclusion of exposed persons who have died—either as wartime casualties or after their return to the United States—within the scope of the state investigations of Agent Orange health effects. Epidemiological studies may generally account for such persons, but the omission of the deceased from the statutory definitions could frustrate state efforts to obtain their military records or to provide genetic counseling to their offspring.

In some states, the military service criterion embraces an overly broad class of veterans. The Illinois law, for example, extends its benefits not only to those who served in Vietnam but to all "Vietnam era veterans."³² Benefits of the Minnesota statute likewise inure to all persons who "served in the armed forces of the United States of America during the Vietnam era."³³ These broad definitions allow former servicemen who never were stationed in Southeast Asia to share the scarce resources that states have committed to the Agent Orange investigation.

To the extent that military service is an appropriate criterion of eligibility, the provisions of Georgia law are more compatible with the purpose of the program.

25. HAWAII REV. STAT. § 321-261 (Supp. 1982).

26. *Id.*

27. *Id.*

28. N.Y. PUB. HEALTH LAW § 2475(1)(a) (McKinney Supp. 1982).

29. Act of June 23, 1980, ch. 353, 1980 N.Y. Laws 563, § 1.

30. OHIO REV. CODE ANN. § 5903.21(A)(4) (Page Supp. 1982).

31. See 32 C.F.R. § 578.48(g) (1982) (conditions of eligibility for Vietnam Service Medal).

32. Agent Orange Study Act §§ 2, 4, ILL. REV. STAT. ch. 126-1/2, §§ 102, 104 (Supp. 1982). See also 51 PA. CONS. STAT. § 20172 (Supp. 1983) (veterans include current residents and resident inductees "who served in the armed forces during the years 1961-1972").

33. MINN. STAT. § 196.21 (Subd. 2) (Supp. 1983).

Georgia limits the scope of its program to persons "who served in Vietnam, Cambodia, or Laos during the Vietnam Conflict."³⁴ The plurality of state Agent Orange laws similarly requires wartime service in Indochina as a prerequisite to participation in the state programs.³⁵ Although it excludes civilians and decedents who were exposed to dioxin in Vietnam, this definition of military service otherwise mirrors the use of Agent Orange and the deployment of American military service personnel.³⁶

The residency requirements that most states have included in their definitions of the exposed class also vary in their appropriateness. In six states, current residence qualifies members of the defined class of veterans for inclusion in the program.³⁷ This simple provision avoids the unfortunate consequences that other, more complex, residency formulas create. Four states, for example, allow eligibility to former residents who lived in the state when they were inducted, but exclude veterans who moved into the state after a prescribed date.³⁸ These states include in their definitions only the Vietnam veteran "who was a resident of this state at the time of his induction into the armed forces of the United States of America, or was a resident of this state" as of a prescribed date.³⁹ Although such residency requirements may legitimately conserve the resources of states that have sponsored comparatively more generous programs, these requirements do so at the expense of many bona fide residents unable to meet the standards. These statutes would, for example, benefit former residents who joined the armed forces while residing in the state or veterans who lived in the state on the prescribed date, while denying benefits to all Vietnam veterans who acquired their residency thereafter.⁴⁰

Thus, the definitions of the exposed class adopted by several states are subject to substantial improvement. In all but two states, exposed civilians whose wartime presence in Indochina served the nation will be denied direct benefits of Agent Orange programs; the studies conducted by their state governments likewise will lack the critical information that they could otherwise provide. Vietnam veterans who became residents in other states after the statutorily prescribed date are also unable to participate in the programs. In several states, however, veterans who did not serve in Indochina (and thus had no exposure to Agent Orange) or who never returned to the state after their induction are entitled to the statutory advantages. The arbitrary lines of eligibility drawn by several legislatures may compound feelings of alienation that reportedly have beset numerous Vietnam veterans.⁴¹ Moreover, the ability of these

34. GA. CODE § 31-30-1(2) (Supp. 1982).

35. See *supra* note 24.

36. West Virginia has included the Korean conflict within the range of its law. See W. VA. CODE § 16-28-1(1) (Supp. 1982).

37. See CAL. MIL. & VET. CODE § 698(a) (West Supp. 1983); GA. CODE § 31-30-1(2) (Supp. 1982); HAWAII REV. STAT. § 321-261 (Supp. 1982); Act of Feb. 21, 1980, ch. 443, 1979 N.J. Laws 1667; N.Y. PUB. HEALTH LAW § 2475 (McKinney Supp. 1982); 51 PA. CONS. STAT. § 20172 (Supp. 1983).

38. See KAN. STAT. ANN. § 73-1701(1) (Supp. 1982); OKLA. STAT. tit. 72, § 350(1) (Supp. 1982); TEX. STAT. ANN. art. 4447w, § 1(1) (Vernon Supp. 1982); W. VA. CODE § 16-28-1(1) (Supp. 1982).

39. TEX. STAT. ANN. art. 4447w, § 1(1) (Vernon Supp. 1982).

40. In one of these states, this option is slightly less arbitrary: in Oklahoma, current residents must have maintained their residence since January 1, 1981, in order to be eligible. OKLA. STAT. tit. 72, § 350(1) (Supp. 1982).

41. See, e.g., *Coming Home at Last*, TIME, Nov. 22, 1982, at 6; *Pleading PTSD*, TIME, May 26, 1980, at 59.

irrational classifications to withstand equal protection analysis is not assured.⁴² The comprehensive definitions adopted by Hawaii and New York are, instead, more appropriately inclusive and more carefully tailored to the issues that the states seek to address.

2. Toxic Substance

The toxic substance definitions that most of the states have adopted also may constrain the investigation of health disorders caused by wartime exposure to phenoxy herbicides. The dioxin TCDD is the contaminant by-product of the phenoxy herbicide mixture that is suspected of causing health disorders.⁴³ Yet most of the states have omitted the dioxin ingredient from their Agent Orange definition. The preponderance of Agent Orange definitions instead focuses only on the combination of dichlorophenoxyacetic acid and trichlorophenoxyacetic acid, from which, under certain conditions, TCDD is created. Typically, the statutes provide that the term "'Agent Orange' means the herbicide composed primarily of trichlorophenoxyacetic acid and dichlorophenoxyacetic acid."⁴⁴ Three states limit their definition of Agent Orange to "the herbicide composed of trichlorophenoxyacetic acid and dichlorophenoxyacetic acid."⁴⁵ Missing from these definitions is any reference to the dioxin TCDD or the synthetic process by which it is formed.⁴⁶

Only Minnesota and Oklahoma include dioxin in their definition. Minnesota defines Agent Orange as "a herbicide containing dioxin and composed primarily of trichlorophenoxyacetic acid and dichlorophenoxyacetic acid."⁴⁷ Under the Oklahoma law, Agent Orange is "the herbicide composed primarily of trichlorophenoxyacetic acid (2,4,5 T) and dichlorophenoxyacetic acid (2,4 D) and its contaminant tetrachlorodibenzo-para-dioxin (dioxin, TCCD)."⁴⁸ The explicit inclusion of dioxin in these definitions will spare the state inquiries from inadvertent confusion.

In recognition of the unknown consequences of dioxin exposure, some states have given a more ambitious focus to their probe. Minnesota not only includes dioxin in its Agent Orange definition, but also has added "chemical agents" to the scope of its investigation, defining them as "dioxin or other toxic substances found in certain defoliants, herbicides, pesticides, and similar chemical substances."⁴⁹ Ohio has augmented its Agent Orange definition with a description of additional "causative agent[s]" about which the state must inquire; these are "chemical defoliants, herbi-

42. See, e.g., *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966) (equal protection clause requires "some rationality in the nature of the class singled out"); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 994-96 (1978).

43. See *supra* note 3.

44. KAN. STAT. ANN. § 73-1701(2) (Supp. 1982). See, e.g., CAL. MIL. & VET. CODE § 698(b) (West Supp. 1983); GA. CODE § 31-30-1(1) (Supp. 1982); HAWAII REV. STAT. § 321-261 (Supp. 1982); TEX. STAT. ANN. art. 4447w, § 1(2) (Vernon Supp. 1982); W. VA. CODE § 16-28-1(2) (Supp. 1982).

45. Agent Orange Study Act § 2, ILL. REV. STAT. ch. 126-1/2, § 102 (Supp. 1982); Act of Feb. 21, 1980, ch. 443, 1979 N.J. Laws 1667, ¶ 2; 51 PA. CONS. STAT. § 20172 (Supp. 1983).

46. See *supra* note 3.

47. MINN. STAT. § 196.21 (Subd. 4) (Supp. 1983).

48. OKLA. STAT. tit. 72, § 350(2) (Supp. 1982).

49. MINN. STAT. § 196.21 (Subd. 3) (Supp. 1983).

cides, and other causative agents, including agent orange."⁵⁰ Washington law has stated its concern to include "delayed stress syndrome."⁵¹ In California, "exposure to herbicides, including Agent Orange" qualifies veterans and their dependents for various forms of state assistance.⁵²

The more comprehensive of these definitions include the range of herbicides used in the Southeast Asian jungles: Agent Green, Agent Pink, Agent Purple, and Herbicide Orange II, as well as Agent Orange.⁵³ The broader definitions of causative agents, like the more comprehensive definitions of the exposed class, allow the states to make a more incisive probe into the postwar health of Vietnam veterans.

C. Reports to Governmental Authorities

The aim of most state Agent Orange investigative programs is to prepare periodic reports on the health effects of wartime exposure to dioxin-tainted herbicides. Most states specify that the report shall contain "current research findings on the effects of exposure to chemical defoliants or herbicides or other causative agents, including Agent Orange, and statistical information compiled from reports submitted by physicians or hospitals."⁵⁴ Other states have set forth less defined⁵⁵ or more detailed⁵⁶ reporting requirements. Seven states provide for presentation of the periodic reports to the United States Veterans' Administration.⁵⁷ Five states require submission of the report to various departments of the state government.⁵⁸ Several

50. OHIO REV. CODE ANN. § 5903.21(A)(2) (Page Supp. 1982).

51. Act of March 31, 1982, ch. 97, 1982 Wash. Laws 461.

52. CAL. MIL. & VET. CODE § 698(a) (West Supp. 1983). Such persons are entitled to aid in the presentation and pursuit of claims against the United States government. *Id.*

53. See *supra* note 9 and accompanying text.

54. GA. CODE § 31-30-3 (Supp. 1982). See also KAN. STAT. ANN. § 73-1703(a) (Supp. 1982); TEX. STAT. ANN. art. 4447w, § 3 (Vernon Supp. 1982); W. VA. CODE § 16-28-3(a) (Supp. 1982).

55. Illinois simply requires its supervisory commission to report "its findings, recommendations and any proposed legislation." Agent Orange Study Act § 6, ILL. REV. STAT. ch. 126-1/2, § 106 (Supp. 1982). New Jersey requires a report of "findings with recommendations for further legislation." Act of Feb. 21, 1980, ch. 443, 1979 N.J. Laws 1667, 1668 at ¶ 6. New York law elicits a report of "findings and recommendations concerning the effectiveness, impact and benefits derived from the special policies" of its dioxin study law. N.Y. PUB. HEALTH LAW § 2475(3) (McKinney Supp. 1982). Oklahoma requires the report to "compile and evaluate information received and actions taken . . ." OKLA. STAT. tit. 72, § 352(A) (Supp. 1982).

56. California provides that the report shall include (1) "[t]he number of California veterans . . . exposed to Agent Orange . . .," (2) "[t]he number of California veterans filing claims for compensation for . . . exposure to Agent Orange . . .," (3) categories "of symptoms reported by the veterans," (4) "summary of medical test results from exposed veterans," and (5) "availability of federal and private funds to offset state expenses incurred in assisting veterans in filing defoliant-related claims." CAL. MIL. & VET. CODE § 698(a)(5) (West Supp. 1983). The similarly comprehensive Minnesota provision requires the report to (1) review and analyze scientific literature covering current research findings on the effects of Agent Orange exposure, (2) summarize state efforts to inform and assist veterans who may have been exposed to Agent Orange, (3) describe and interpret results of studies undertaken, and (4) present any appropriate comments or recommendations. MINN. STAT. § 196.22 (Subd. 4) (Supp. 1983).

57. See GA. CODE § 31-30-3(a) (Supp. 1982); HAWAII REV. STAT. § 321-264 (Supp. 1982); KAN. STAT. ANN. § 73-1703(a) (Supp. 1982); MINN. STAT. § 196.22 (Subd. 4) (Supp. 1983); OHIO REV. CODE ANN. § 5903.22(A)(3) (Page Supp. 1982); TEX. STAT. ANN. art. 4447w, § 3(a) (Vernon Supp. 1982); W. VA. CODE § 16-28-3 (Supp. 1982).

58. See GA. CODE § 31-30-3(a) (Supp. 1982) (Georgia Department of Veterans Service); HAWAII REV. STAT. § 321-264 (Supp. 1982) (Veterans Affairs Commission); KAN. STAT. ANN. § 73-1703(a) (Supp. 1982) (Kansas veterans' commission); TEX. STAT. ANN. art. 4447w, § 3(a) (Vernon Supp. 1982) (Veterans Affairs Commission); W. VA. CODE § 16-28-3 (Supp. 1982) (West Virginia department of veterans affairs).

states also provide for circulation of the report to private organizations of veterans⁵⁹ and to medical associations.⁶⁰

The visibility of an Agent Orange study will depend largely on the frequency of the reporting obligation. Most states require an annual report.⁶¹ Two states require a report only at or near the conclusion of the Agent Orange program.⁶² In Ohio, the operative agency is bound to make only one report at an unspecified time,⁶³ while the supervisory authority must furnish an annual report to the legislature.⁶⁴

Only one state has undertaken any effort to quantify and make public its stake in the Agent Orange controversy. California has required its program officials to determine the "number of California veterans identified as having been exposed to Agent Orange and other defoliants."⁶⁵ Despite the fundamental importance of this tally for epidemiological studies and political purposes, no other state has sought report of a similar count.

Only one state, moreover, has provided for coordination of its Agent Orange investigation and reporting process with those of other states. Oklahoma has charged its program officials to "coordinate activities with other states providing veterans with similar programs related to chemical defoliants or herbicides or other causative agents, including Agent Orange."⁶⁶ Such cooperation will afford the Oklahoma program a unique perspective. No additional state has required attention to the Agent Orange efforts of other states in preparation of the periodic reports or otherwise.

Most states, however, have sought to compile in their reports available research information regarding Agent Orange health effects. Hawaii, for example, requires its authorities to "obtain current research findings on the effects of exposure to chemical defoliants, herbicides, or other causative agents, including agent orange."⁶⁷ Ohio has ordered its designated medical facility to "[c]ompile and evaluate information regarding exposure to causative agents"⁶⁸ Although potentially duplicative, the various state government efforts to develop Agent Orange research bibliographies could provide a thorough listing of available data.

59. See HAWAII REV. STAT. § 321-264 (Supp. 1982) ("veterans groups, including but not limited to, Veterans Administration Readjustment Counseling Service"); KAN. STAT. ANN. § 73-1703(a) (Supp. 1982) ("veterans groups"); OHIO REV. CODE ANN. § 5903.22(A)(3) (Page Supp. 1982) ("veterans groups in this state"); OKLA. STAT. tit. 72, § 352(A) (Supp. 1982) ("other interested institutions or groups"); TEX. STAT. ANN. art. 4447w, § 3(a) (Vernon Supp. 1982) ("other veterans' groups"); W. VA. CODE § 16-28-3(a) (Supp. 1982) ("other veterans' groups").

60. OHIO REV. CODE ANN. § 5903.22(A)(3) (Page Supp. 1982).

61. These states are Georgia, Hawaii, Kansas, Minnesota, New York, Oklahoma, Texas, and West Virginia. See GA. CODE § 31-30-3(a) (Supp. 1982); HAWAII REV. STAT. § 321-264 (Supp. 1982); KAN. STAT. ANN. § 73-1703 (Supp. 1982); MINN. STAT. § 196.22 (Subd. 4) (Supp. 1983); N.Y. PUB. HEALTH LAW § 2475(3) (McKinney Supp. 1982); OKLA. STAT. tit. 72, § 352(A) (Supp. 1982); TEX. STAT. ANN. art. 4447w, § 3 (Vernon Supp. 1982); W. VA. CODE § 16-28-3(a) (Supp. 1982).

62. These states are California and Illinois. CAL. MIL. & VET. CODE § 698(c) (West Supp. 1983); Agent Orange Study Act § 6, ILL. REV. STAT. ch. 126-1/2, § 106 (Supp. 1982).

63. OHIO REV. CODE ANN. § 5903.23(A) (Page Supp. 1982) ("medical facility designated by the Ohio Board of Regents shall . . . [c]ompile and evaluate information regarding exposure to causative agents into a report to be submitted to the board of regents and the agent orange advisory council").

64. *Id.* § 5903.22(A)(3).

65. CAL. MIL. & VET. CODE § 698(a)(5)(A) (West Supp. 1983).

66. OKLA. STAT. tit. 72, § 358(B)(6) (Supp. 1982).

67. HAWAII REV. STAT. § 321-264 (Supp. 1982).

68. OHIO REV. CODE ANN. § 5903.23(A) (Page Supp. 1982). Illinois has designated an agency to serve "as a central data bank for compiling all appropriate data relating to such defoliants and their possible after-effects." Agent Orange Study Act §§ 4, 6, ILL. REV. STAT. ch. 126-1/2, § 104(b) (Supp. 1982). Minnesota has provided for the compilation of

D. Collection of Agent Orange Health Effects Data

The reports compiled by most states are slated to assess the health of veterans and other members of the exposed class. This analysis generally will derive from information that veterans voluntarily supply to their physicians and from epidemiological studies that the states have commissioned. The states have provided for collection of this information by a variety of means that vary widely in their likely effectiveness.

1. Information Supplied by Veterans to Their Physicians

Several states have provided for the systematic collection of medical data from self-selected veterans.⁶⁹ Commonly sought is information regarding the symptoms, diagnosis, and treatment of health disorders that may be related to dioxin exposure. A typical statutory foundation for this self-selection study is that of Kansas:

A physician who has primary responsibility for treating a veteran who may have been exposed to chemical defoliants or herbicides or other causative agents, including agent orange, while serving in the armed forces of the United States, shall submit a report, at the request of the veteran, to the [state] on a form provided by the [state]. If there is no physician having primary responsibility for treating the veteran, the medical care facility treating the veteran, at the request of the veteran, shall submit the report to the [state].⁷⁰

The physicians and hospitals serve as authoritative conduits through which the veterans can submit this data. These programs assign significant duties to physicians and hospitals, but place responsibility upon the veteran to initiate the process.

The broad authority invested in officials of most Agent Orange programs is a hallmark of the states' commitment to the self-selection concept. The self-selection survey laws generally allow program officials to "require the veteran to provide such other information" as they deem necessary.⁷¹ This provision allows the states to expand the data base of their self-selection survey and to examine thoroughly the self-selected veterans. Because the self-selection survey laws generally do not seek data about the children or wartime associates of veterans, for example, this authority would include such an inquiry.

The confidentiality policies of the statutes likewise inure to the success of the self-selection survey. Concern for public revelation of their health defects may inhibit

"information regarding epidemiological, genetic and other scientific studies proposed, underway, or completed that pertain to adverse health conditions which may be associated with exposure to chemical agents, including Agent Orange." MINN. STAT. § 196.22 (Subd. 1) (Supp. 1983). New Jersey likewise has established a commission "to serve as a central data bank for compiling all appropriate data relating to such poisonings and their after-effects." Act of Feb. 21, 1980, ch. 443, 1979 N.J. Laws 1667, § 4b. New York has charged its authorities to "maintain a central data bank . . . for information collected on the health effects of exposure to dioxin and for the cataloguing of existing scientific and medical literature on the health effects of this exposure . . ." N.Y. PUB. HEALTH LAW § 2475(1)(c) (McKinney Supp. 1982).

69. See GA. CODE § 31-30-2(a), (b) (Supp. 1982); HAWAII REV. STAT. § 321-263 (Supp. 1982); KAN. STAT. ANN. § 73-1702 (Supp. 1982); OKLA. STAT. tit. 72, § 351 (Supp. 1982); TEX. STAT. ANN. art. 4447w, § 2 (Vernon Supp. 1982); W. VA. CODE § 16-28-2 (Supp. 1982).

70. KAN. STAT. ANN. § 73-1702(a) (Supp. 1982).

71. W. VA. CODE § 16-28-2(c) (Supp. 1982) ("department may require the veteran to provide such other information as determined by the director"). See also, e.g., HAWAII REV. STAT. § 321-263(c) (Supp. 1982) ("department may require the veteran or exposed resident to provide such information as necessary"); KAN. STAT. ANN. § 73-1702(c) (Supp. 1982) ("secretary may require the veteran to provide such other information as determined by the secretary").

veterans from providing such personal information to the state. The legislatures, however, commonly have enacted privacy rules, of which the Texas provision is characteristic: "The identity of a veteran about whom a report has been made may not be disclosed unless the veteran consents to the disclosure."⁷² These laws normally provide, however, that "[s]tatistical information collected under this law is public information."⁷³ This policy has won consistent legislative approval.⁷⁴ Hawaii has further ensured confidentiality by providing for nondisclosure of the identity of the veteran on the form used to report the symptoms, diagnosis, and treatment of Agent Orange victims.⁷⁵

Several factors, however, may impede the ability of veterans to bring their concerns to the attention of physicians and the state. Although the exact nature of the Agent Orange problem is unknown, some states have vested in medical personnel discretion to exclude certain veterans from the self-selected study group. Hawaii, for example, requires submission of a report only when a physician "believes the veteran or exposed resident may have been exposed to chemical defoliants, herbicides, or other causative agents, including agent orange."⁷⁶ Hawaiians must pass the muster of their physician, then, in order to include themselves in the survey population. The language used by other states is sufficiently ambiguous to allow the same veto power to physicians and hospitals. The West Virginia measure, for instance, requires submission of a report by a "physician who has primary responsibility for treating a veteran who believes he may have been exposed to chemical defoliants or herbicides or other causative agents, including agent orange, while serving in the armed forces of the United States."⁷⁷ This test arguably allows a physician to decline to report if he or she believes that a veteran had no exposure to any causative agents.

Such provisions invite an unwarranted exercise of professional medical judgment. The inarticulate purpose of the self-selection survey program is to allow veterans an unfettered opportunity to provide data regarding the Agent Orange problem; the role of the physician or hospital normally is limited to interpretation of the data supplied.⁷⁸ To allow the physician or hospital to select the population is to deny veterans this opportunity, and may thwart the effort of the state to diagnose the effects of Agent Orange on its population.

72. TEX. STAT. ANN. art. 4447w, § 4 (Vernon Supp. 1982).

73. *Id.*

74. GA. CODE § 31-30-4 (Supp. 1982); HAWAII REV. STAT. § 321-265 (Supp. 1982); KAN. STAT. ANN. § 73-1704 (Supp. 1982); MINN. STAT. § 196.25 (Supp. 1983); N.Y. PUB. HEALTH LAW § 2475(2) (McKinney Supp. 1982); OHIO REV. CODE ANN. § 5903.21(G) (Page Supp. 1982); OKLA. STAT. tit. 72, § 353 (Supp. 1982); TEX. STAT. ANN. art. 4447w, § 4 (Vernon Supp. 1982); W. VA. CODE § 16-28-4 (Supp. 1982).

75. HAWAII REV. STAT. § 321-263(b) (Supp. 1982).

76. *Id.* § 321-263(a). *See also* OKLA. STAT. tit. 72, § 351(A) (Supp. 1982) (requiring report by "physician or other qualified health care professional who has primary responsibility for treating a veteran who believes the veteran may have been exposed to chemical defoliants or herbicides or other causative agents, including Agent Orange . . .").

77. W. VA. CODE § 16-28-2(a) (Supp. 1982). *See also* GA. CODE § 31-30-2(a) (Supp. 1982) (requiring report by a physician "who has primary responsibility for treating a veteran who believes he may have been exposed to chemical defoliants or herbicides or other causative agents, including . . . Agent Orange . . ."); TEX. STAT. ANN. art. 4447w, § 2(a) (Vernon Supp. 1982) (same).

78. *See, e.g.,* KAN. STAT. ANN. § 73-1702(a) (Supp. 1982); OHIO REV. CODE ANN. § 5903.21(B) (Page Supp. 1982).

A second factor that unduly complicates the self-selection survey involves the flow of data from medical personnel to the state government. In all but one of the states that have undertaken self-selection surveys, the physician reports directly to the agency that compiles and evaluates the data.⁷⁹ In Ohio, however, the reporting physician submits data to an intermediate medical facility⁸⁰ that has no statutory duty to compile the data.⁸¹ This responsibility instead rests with the Ohio Board of Regents.⁸² Thus, the agency that gathers the data does not compile and evaluate it. A disjointed information flow may result.

A third potential problem is the blanket legal immunity accorded to professional participants in the reporting program. The typical law provides that "[A] physician or a hospital which complies with this [requirement] shall not be held civilly or criminally liable for providing the information required"⁸³ This broad exemption accommodates the new duties assigned to physicians and hospitals for the primary benefit of the state and the protected class. The lack of any liability for providing information, however, may, by implication, allow medical personnel to shirk their duties with impunity.

A mandate to design the reporting form may expedite the self-selection survey. Most of the self-selection survey laws omit any mandate to design the reporting form. Each law generally provides that physicians and hospitals shall submit reports "on a form provided by" a state agency, which form "shall request" various statutorily specified information.⁸⁴ The laws likewise provide rule-making power to the agency that supervises the Agent Orange programs.⁸⁵ Yet, only one state legislature—that of Hawaii—specifically has authorized or charged any official or agency to develop the reporting form.⁸⁶ The lack of an explicit duty to design the form could delay the development of the self-selection survey.

Finally, a critical weakness of the self-selection survey concept in several states is the lack of a precedent educational program. The self-selection survey laws assume that veterans and other members of the exposed class are familiar with potential Agent Orange health hazards. Self-selection by an uninformed population, however, is as unlikely to adduce meaningful information as is analysis by uninformed health care professionals. Several states nonetheless have yet to make a commitment to the necessary instructional effort. Indeed, only a few states have established programs to

79. See, e.g., KAN. STAT. ANN. § 73-1702(a) (Supp. 1982) ("[the] physician . . . shall submit a report . . . to the secretary"); W. VA. CODE § 16-28-2(a) (Supp. 1982) ("[the] physician . . . shall . . . submit a report to the department").

80. OHIO REV. CODE ANN. § 5903.21(B) (Page Supp. 1982).

81. *Id.* § 5903.23.

82. *Id.* § 5903.22(A)(3).

83. HAWAII REV. STAT. § 321-266 (1982). See also GA. CODE § 31-30-5 (Supp. 1982); KAN. STAT. ANN. § 73-1705 (Supp. 1982); OHIO REV. CODE ANN. § 5903.21(E) (Page Supp. 1982); OKLA. STAT. tit. 72, § 354 (Supp. 1982); TEX. STAT. ANN. art. 4447w, § 5 (Vernon Supp. 1982); W. VA. CODE § 16-28-5 (Supp. 1982).

84. See *supra* notes 69-71 and accompanying text.

85. *Id.*

86. HAWAII REV. STAT. § 321-271 (Supp. 1982) ("The director of health shall adopt rules necessary to the administration of the programs authorized The rules shall include information to be provided by a physician or hospital to a veteran or exposed resident of the veterans' or exposed residents' rights under this part.")

advise veterans⁸⁷ or physicians⁸⁸ of the potential physiological effects of Agent Orange. The relative novelty of the dioxin hazard and the perceived alienation of Vietnam veterans from American society and each other further reinforce the need for greater state efforts to communicate this relevant information.

2. *Epidemiological Studies of Agent Orange Health Effects*

Several states also have commissioned studies, in which the state will take the initiative, of the incidence and distribution of dioxin-related health problems. Six states have mandated epidemiological studies of veterans "who have cancer or other medical problems associated with exposure to . . . Agent Orange, or who have children born with birth defects after the veterans' suspected exposure to . . . Agent Orange."⁸⁹ Ohio law simply requires a comparative probe of exposed and non-exposed sample groups of veterans.⁹⁰ Several other states have authorized various officials to conduct undefined epidemiological studies.⁹¹ These studies, in which the states actively will seek information, will offer another measure of the extent of dioxin-related health problems.

Two pitfalls may affect the epidemiological studies. The authorizing statutes generally require consultation with a board-certified medical toxicologist in the design and implementation of the study.⁹² Such consultation may not be necessary where equivalent expertise is available to the state. There is no provision in these

87. California has established an "outreach program to inform California Vietnam veterans of the possible detrimental effects of herbicide exposure in Vietnam." CAL. MIL. & VET. CODE § 698(a)(2) (West Supp. 1983). The California educational effort includes, among other projects, "dissemination of information to county veterans service officers and other California veteran agencies and organizations." *Id.* Oklahoma likewise has provided for an "outreach program to identify and inform veterans of the possible detrimental effects of exposure to chemical defoliant or herbicides or other causative agents, including Agent Orange." OKLA. STAT. tit. 72, § 358(B)(1) (Supp. 1982). New York law, moreover, orders the commissioner of health to "establish, promote and maintain a public information program on dioxin. . . . [including] . . . an effort to contact Vietnam era veterans and employees of the public and private sectors within the state who were exposed to an herbicide containing dioxin." See N.Y. PUB. HEALTH LAW § 2475(1)(a) (McKinney Supp. 1982).

88. Minnesota, for example, requires distribution of "medical information to health professionals . . . regarding the detection, diagnosis, and treatment of acute and chronic symptoms which may be associated with exposure to chemical agents, including Agent Orange." MINN. STAT. § 196.24 (Subd. 1) (Supp. 1983). New York has charged its health commissioner to "initiate education for health professionals to assist them in understanding the potential risks and state-of-the-art knowledge with regard to detection, diagnosis and treatment of acute and chronic symptoms associated with dioxin exposure." N.Y. PUB. HEALTH LAW § 2475(1)(d) (McKinney Supp. 1982). Oklahoma likewise has founded "an education program for health professionals on the detection, diagnosis and treatment of the symptoms associated with exposure to chemical defoliant or herbicides or other causative agents, including Agent Orange." OKLA. STAT. tit. 72, § 356(A)(2) (Supp. 1982). Washington has required its veterans affairs department to "prepare and distribute, to all licensed physicians and mental health centers . . . information on the symptoms and treatment of problems stemming from exposure to 'Agent Orange.'" Act of March 31, 1982, ch. 97, 1982 Wash. Laws 461.

89. GA. CODE § 31-30-3(b) (Supp. 1982). See also HAWAII REV. STAT. § 321-264 (Supp. 1982); N.Y. PUB. HEALTH LAW § 2475(1)(b) (McKinney Supp. 1982); OKLA. STAT. tit. 72, § 358(B)(5) (Supp. 1982); TEX. STAT. ANN. art. 4447w, § 3(b) (Vernon Supp. 1982); W. VA. CODE § 16-28-3(b) (Supp. 1982).

90. OHIO REV. CODE ANN. § 5903.23(B) (Page Supp. 1982).

91. See, e.g., KAN. STAT. ANN. § 73-1703(b) (Supp. 1982) ("secretary . . . may conduct epidemiological studies on veterans . . ."); MINN. STAT. § 196.22 (Subd. 3) (Supp. 1983) ("commissioner may contract for limited studies regarding the prevalence of adverse health conditions in veterans which may be associated with possible exposure to chemical agents, including Agent Orange.")

92. See, e.g., HAWAII REV. STAT. § 321-264 (Supp. 1982); W. VA. CODE § 16-28-3(a) (Supp. 1982).

statutes, moreover, for the identification of affected veterans. The epidemiological study laws generally contain no mandate to obtain exposure data, which only military records of the federal government may contain, or pertinent health information such as the specific incidence of cancer and birth defects. Thus, epidemiologists may have to conduct their studies with superfluous expertise and inadequate or unreliable sample groups.

E. Bureaucratic and Financial Commitment

A successful investigation of Agent Orange health hazards is also dependent on the bureaucratic and financial structure of the state effort. Most states have assigned responsibility for their Agent Orange study efforts to preexisting agencies. These agencies include departments of veterans' affairs,⁹³ health,⁹⁴ health and environment,⁹⁵ and a board of regents.⁹⁶ Assignment to the regular bureaucracy may subjugate the Agent Orange efforts to the interests already served by that agency. Indeed, for preexisting agencies, the priority of the Agent Orange effort will depend on its ability to displace existing agency work or on the allowance of additional staff to the agency. The absence of a specific legislative provision for one or the other factor could engulf the Agent Orange effort in the existing priorities of the agency.

An alternative adopted by several states is the creation of special Agent Orange commissions. The Agent Orange Advisory Council of Ohio, for example, is charged to assure implementation of the Agent Orange program.⁹⁷ In Minnesota, the special bureaucracy is a new section of an existing department.⁹⁸ Headed by multi-member panels, these commissions generally incorporate into the state government the impetus necessary to motivate an Agent Orange investigation. The size and composition of the special commissions differ from state to state. Normally, however, members of these commissions are appointed by the governor,⁹⁹ a cabinet official,¹⁰⁰ or legislative leaders.¹⁰¹ The members generally serve simultaneous terms,¹⁰² select their own chairperson,¹⁰³ and are removable for cause.¹⁰⁴

93. See CAL. MIL. & VET. CODE § 698 (West Supp. 1982); Agent Orange Study Act § 5, ILL. REV. STAT. ch. 126-1/2, § 105 (Supp. 1982); MINN. STAT. § 196.21 (Subd. 5) (Supp. 1983); Act of Feb. 21, 1980, ch. 443, 1979 N.J. Laws 1667, ¶ 5; Act of March 31, 1982, ch. 97, 1982 Wash. Laws 461.

94. HAWAII REV. STAT. § 321-262 (Supp. 1982); N.Y. PUB. HEALTH LAW § 2475 (McKinney Supp. 1982); OKLA. STAT. tit. 72, § 350(3), (6) (Supp. 1982); TEX. STAT. ANN. art. 4447w, § 1(3) (Vernon Supp. 1982); W. VA. CODE § 16-28-1(3), (4) (Supp. 1982).

95. KAN. STAT. ANN. § 73-1701(3) (Supp. 1982).

96. OHIO REV. CODE ANN. § 5903.22 (Page Supp. 1982).

97. *Id.* § 5903.25(c).

98. MINN. STAT. § 196.23 (Subd. 1) (Supp. 1983) (department of veterans affairs).

99. See, e.g., Agent Orange Study Act § 3, ILL. REV. STAT. ch. 126-1/2, § 103 (Supp. 1982); 51 PA. CONS. STAT. § 20173(b) (Supp. 1983).

100. See, e.g., OKLA. STAT. tit. 72, § 358(A) (Supp. 1982).

101. See, e.g., Agent Orange Study Act § 3, ILL. REV. STAT. ch. 126-1/2, § 103 (Supp. 1982).

102. See, e.g., N.Y. PUB. HEALTH LAW § 2475 note § 2 (McKinney Supp. 1982) ("Temporary State Commission on Dioxin Exposure"); OKLA. STAT. tit. 72, § 358(A) (Supp. 1982).

103. See, e.g., Agent Orange Study Act § 3, ILL. REV. STAT. ch. 126-1/2, § 103 (Supp. 1982); OHIO REV. CODE ANN. § 5903.24(A) (Page Supp. 1982).

104. See, e.g., OKLA. STAT. tit. 72, § 358(A) (Supp. 1982).

The laws that establish such commissions generally guarantee representation to persons having a direct interest in accomplishment of the statutory purpose and persons possessed with the necessary expertise. For example, military service qualifications are required of five of the thirteen members of the Agent Orange Study Commission of Illinois.¹⁰⁵ New York required the membership of five honorably discharged Vietnam era veterans from specified sectors of the state economy on its Temporary State Commission on Dioxin Exposure.¹⁰⁶ The seven-member Agent Orange Outreach Committee of Oklahoma consists of two Vietnam veterans and one Vietnam era veteran plus four "health care professionals with demonstrated skills in those areas related to toxic chemical contamination."¹⁰⁷ The New Jersey commission includes a majority of Vietnam era veterans.¹⁰⁸

The structure of the Ohio effort is more complex. The Agent Orange Advisory Council of Ohio consists of seven members appointed by the Ohio Board of Regents.¹⁰⁹ Three members must be veterans, nominated by a committee of the Veterans Association of State Commanders and Adjutants.¹¹⁰ The effect of this procedure is to involve all categories of veterans in selection of the Vietnam-veteran members and to broaden the accountability of those members. The other four council members must be chosen from "the medical specializations of epidemiology, toxicology, genetics, and family dynamics."¹¹¹ The Ohio statute provides staggered terms for council members and makes no provision for removal for cause.¹¹²

The Ohio framework, however, may institutionalize conflicting policies. Ohio uniquely has charged its Agent Orange Advisory Council with the duty to "[a]ssure that the studies, counseling and tests performed are carried out independently, efficiently, and effectively."¹¹³ On the other hand, the Ohio law gives the Board of Regents, which supervises the Agent Orange effort in Ohio, considerable discretion over implementation of the Agent Orange program. The Ohio law provides that the Board of Regents shall "[d]esignate a medical facility or facilities to perform part or all of the duties" specified in the state Agent Orange laws.¹¹⁴ By implication, the Board of Regents could designate a medical facility to perform only part of the Agent Orange effort and, in frustration of the Agent Orange Advisory Council, leave the remainder of the program unimplemented.

Compensation of council members and staffing practices differ among the states. Ohio provides that "the members of the Council shall serve without compensation or payment of any kind."¹¹⁵ Other states provide for reimbursement of

105. Agent Orange Study Act § 3, ILL. REV. STAT. ch. 126-1/2, § 103 (Supp. 1982) ("3 of whom shall be Vietnam-era veterans and 2 of whom shall have experience in or extensive knowledge of military service").

106. N.Y. PUB. HEALTH LAW § 2475 note § 2 (McKinney Supp. 1982) ("Temporary State Commission on Dioxin Exposure").

107. OKLA. STAT. tit. 72, § 358(A) (Supp. 1982).

108. Act of Feb. 21, 1980, ch. 443, 1979 N.J. Laws 1667, ¶ 3.

109. OHIO REV. CODE ANN. § 5903.24(A) (Page Supp. 1982).

110. *Id.* See also *id.* § 5903.21(F).

111. *Id.* § 5903.24(A).

112. *Id.*

113. *Id.* § 5903.25(C).

114. *Id.* § 5903.22(A)(1).

115. *Id.* § 5903.24(A).

expenses.¹¹⁶ Several states provide executive personnel and modest clerical support.¹¹⁷ Other states do not allow the special Agent Orange bureaucracies to hire staff.¹¹⁸ The manpower policies of the states reflect their respective commitments to the Agent Orange inquiry.¹¹⁹

Commitment to the investigation of Agent Orange health problems also is evinced by the degree to which the states explicitly condition their programs on availability of funds. Several states expressly have limited their mandates to "the extent to which funds are available."¹²⁰ Georgia, for example, has provided that "[t]his chapter shall become effective when and to the extent that funds are appropriated and available to the Department of Human Resources under an appropriation which specifically refers to this chapter and provides that it is intended for the implementation of this chapter."¹²¹

Other states have tied the existence of their programs to corollary federal efforts. The provisions of the Georgia Code are typical. The Georgia law authorizes the state to "discontinue any program required by this chapter or any duty required of a physician or hospital under this chapter" upon a finding that "the federal government is performing the referral and screening functions."¹²² Thus, such provisions allow abandonment of all or part of the state program upon assumption of some duties by the federal government. The effect of these disclaimers is to abase the mandate of the legislature.

The duration of the state Agent Orange programs is a further measure of the intensity with which the states intend to pursue the Agent Orange inquiry. Several programs have an indefinite duration.¹²³ Other state efforts, however, are subject to

116. See Act of Feb. 21, 1980, ch. 443, 1979 N.J. Laws 1667, § 3 ("[M]embers of the commission shall serve without compensation but shall be entitled to reimbursement by the commission for expenses necessarily incurred in the performance of their duties"); N.Y. PUB. HEALTH LAW § 2475 note § 4 (McKinney Supp. 1982) ("The members of the [Temporary State Commission on Dioxin Exposure] shall receive no compensation for their services but shall be allowed their actual and necessary expenses incurred in the performance of their duties"); OKLA. STAT. tit. 72, § 358(A) (Supp. 1982) ("The members shall receive no compensation except for reimbursement for their actual and necessary expenses").

117. See Agent Orange Study Act § 3, ILL. REV. STAT. ch. 126-1/2, § 103 (Supp. 1982) (providing for employment of "executive director and such clerical support as is necessary to effectuate the purposes of this Act"); MINN. STAT. § 196.23 (Subd. 1) (Supp. 1983) (providing for appointment of director and employment of clerical support); Act of Feb. 21, 1980, ch. 443, 1979 N.J. Laws 1667, § 3 ("The commission shall employ an executive director and such clerical support as is necessary to effectuate the purposes of this act."); N.Y. PUB. HEALTH LAW § 2475 note § 3 (McKinney Supp. 1982) ("The [Temporary State Commission on Dioxin Exposure] may employ and at pleasure remove such personnel as it may deem necessary, including an executive director, for the performance of its functions and fix their compensation within the amounts made available therefor.")

118. See, e.g., OHIO REV. CODE ANN. § 5903.24 (Page Supp. 1982); OKLA. STAT. tit. 72, § 358(A) (Supp. 1982).

119. See OHIO REV. CODE ANN. § 123.024 (Page Supp. 1982). At least one state has facilitated the flow of information to veterans' groups by legislatively providing office space for organizations of Vietnam veterans. The Vietnam veterans' organizations generally have not yet been incorporated and chartered by the Congress. Instead, they are simply recognized by the United States Veterans' Administration at this point. Ohio, which formerly provided office space at state expense to all veterans' organizations incorporated and chartered by the Congress, now has extended this privilege to veterans' organizations that are recognized by the United States Veterans' Administration. *Id.* This measure may augment the potential clout of the veterans who have the most substantial interest in performance of the Agent Orange study.

120. See, e.g., OHIO REV. CODE ANN. § 5903.23(C) (Page Supp. 1982).

121. GA. CODE § 31-30-9 (Supp. 1982).

122. *Id.* § 31-30-8. See also HAWAII REV. STAT. § 321-270 (Supp. 1982); KAN. STAT. ANN. § 73-1709 (Supp. 1982); TEX. STAT. ANN. art. 4447w, § 9 (Vernon Supp. 1982); W. VA. CODE § 16-28-9 (Supp. 1982).

123. See, e.g., MINN. STAT. § 196.19-.26 (Supp. 1983); OHIO REV. CODE ANN. § 5903.21-.26 (Page Supp. 1982).

sunset laws.¹²⁴ In the latter states, the mere passage of time may eclipse the Agent Orange programs regardless of their progress.

Numerous states have authorized their attorneys general to litigate on behalf of veterans who seek data relating to their possible exposure to Agent Orange.¹²⁵ Discretion to pursue the claim of the veterans commonly remains with the attorney general. The usual provision is as follows:

The Attorney General may represent a class of individuals composed of veterans who may have been injured because of contact with chemical defoliants or herbicides or other causative agents, including Agent Orange, in a suit for release of information relating to exposure to such chemicals during military service and for release of individual medical records.¹²⁶

One state has placed an affirmative duty upon its attorney general to litigate under certain circumstances. In addition to the standard authorization to represent a class of veterans, Ohio requires its attorney general to represent a designated medical facility that seeks exposure data or medical records.¹²⁷ Other states are less insistent upon action by their attorney general.¹²⁸

The state attorneys general have no power to litigate on behalf of exposed persons omitted from the statutory definitions of the protected class. Instead, they are authorized to seek exposure data only for persons defined as veterans. This limitation may complicate class action litigation. Indeed, a party against whom judgment is rendered in favor of the defined class would not have to produce data relating to such persons. Incorporation of restrictive definitions of "veteran" into the attorney general authorization may, for some exposed persons, make recovery a no less arduous process.

III. DIRECT STATE ASSISTANCE TO VETERANS

In addition to the study and reporting process, several states have established direct assistance programs as a part of their Agent Orange efforts. These initiatives have taken the following three forms: (1) state-funded genetic testing, screening, and counseling; (2) state assistance in filing and pursuing claims; and (3) state referral to

124. California has provided for termination of its effort on June 30, 1985. CAL. MIL. & VET. CODE § 698(c) (West Supp. 1983). Illinois has established a two-year effort. Agent Orange Study Act § 8, ILL. REV. STAT. ch. 126-1/2, § 108 (Supp. 1982). New Jersey has had a short-term program. Act of Feb. 21, 1980, ch. 443, 1979 N.J. Laws 1667, 1668 at ¶ 6. Washington ordained the end of its program by December 31, 1982. Act of March 31, 1982, ch. 97, 1982 Wash. Laws 461.

125. See GA. CODE § 31-30-6 (Supp. 1982); HAWAII REV. STAT. § 321-267 (Supp. 1982); KAN. STAT. ANN. § 73-1706 (Supp. 1982); OHIO REV. CODE ANN. § 5903.26 (Page Supp. 1982); OKLA. STAT. tit. 72, § 355 (Supp. 1982); TEX. STAT. ANN. art. 4447w, § 6 (Vernon Supp. 1982); W. VA. CODE § 16-28-6 (Supp. 1982).

126. OKLA. STAT. tit. 72, § 355 (Supp. 1982).

127. OHIO REV. CODE ANN. § 5903.26 (Page Supp. 1982). The Ohio law provides:

The attorney general shall represent a medical facility designated by the board of regents under section 5903.22 of the Revised Code in any suit for the release of information relating to exposure to causative agents by veterans who served in the armed forces during the Vietnam conflict. With a veteran's consent, the attorney general shall also represent a medical facility in a suit for release of individual medical records.

128. See, e.g., MINN. STAT. § 196.26 (Supp. 1983) (commissioner may request the attorney general to represent class of veterans in suits for release of exposure information and medical records). Yet the Minnesota law also provides that "[w]ithin his powers and duties . . . the commissioner shall take any action appropriate to represent the concerns of veterans related to exposure to chemical agents, including Agent Orange, to appropriate officials and representatives of the United States government." *Id.* § 196.22 (Subd. 5).

advocative and medical service agencies. Like the programs for collection and reporting of information, these substantive efforts reaffirm the commitment of the state to resolution of the Agent Orange controversy. Yet availability of these services likewise depends upon the statutory definition of the exposed class, and, to an even greater degree than the diagnostic programs, upon state funding and the accessibility of the programs.

A. Genetic Counseling

Several states have established genetic testing, screening, and counseling services for veterans. Texas, for example, has undertaken to "provide veterans with fat tissue biopsies, genetic counseling, and genetic screening to determine if the veteran has suffered physical damage as a result of substantial exposure to chemical defoliants or herbicides or other causative agents, including Agent Orange."¹²⁹ West Virginia has established a similar program.¹³⁰ Minnesota "provide[s] genetic information and counseling to veterans who have concerns regarding the possible genetic effects which may be associated with exposure to chemical agents, including Agent Orange."¹³¹ The genetic screening programs provided by these states are services to which veterans are statutorily entitled.

Other states have conditioned their genetic screening and counseling programs on availability of funds. Hawaii, for example, has stated that "within the funds appropriated by the legislature," the state will institute a cooperative program of genetic counseling and screening.¹³² Ohio law requires that a designated medical facility provide genetic counseling, but only "[t]o the extent funding is available."¹³³ Georgia follows a similar practice.¹³⁴ In these states, the legislature retains direct and continuous discretion over the functioning of genetic counseling programs.

Accessibility of screening and counseling services also varies among the states. Ohio law provides for genetic screening and counseling at only one designated

129. TEX. STAT. ANN. art. 4447w, § 7(a)(2) (Vernon Supp. 1982).

130. W. VA. CODE § 16-28-7(a)(2) (Supp. 1982).

131. MINN. STAT. § 196.24 (Subd. 2) (Supp. 1983).

132. HAWAII REV. STAT. § 321-268(2) (Supp. 1982).

133. OHIO REV. CODE ANN. § 5903.23(C) (Page Supp. 1982). In Ohio, this funding-sensitive genetic screening program marked a retreat from a previous entitlement to genetic screening and counseling. The Ohio General Assembly in 1981 had adopted H.B. 694, an appropriations bill that created and allocated \$500,000 for the following program:

The foregoing appropriation item 235-476 Agent Orange Genetic Screening shall be used to provide free genetic screening and counseling to Vietnam veterans and their children to determine genetic contamination as a result of possible contact with the toxic defoliant referred to as Agent Orange. Each state-supported medical school or associated hospital shall make available sufficient facilities for this screening and counseling, and shall submit to the Ohio Board of Regents a request for funds for reimbursement of their costs. Upon receipt of such request, the Ohio Board of Regents, subject to Controlling Board approval, shall release funds in the amount requested. Each genetic screening shall be recorded and the results shall be reported to the Chancellor of the Ohio Board of Regents, who shall submit a report to each member of the Ohio General Assembly, the Adjutant General and the Director of the United States Veterans' Administration by June 1, 1983.

1981 Ohio Laws H.B. 694. Subsequent adoption of Am. Sub. S.B. 406, however, repealed these provisions and ended the entitlement of veterans and their dependents to free genetic screening in Ohio. See 1982 Ohio Laws Am. Sub. S.B. 406, § 4.

134. See GA. CODE § 31-30-9 (Supp. 1982).

medical facility.¹³⁵ The genetic counseling programs of other states generally are coordinated through the more localized state university medical systems.¹³⁶ One state has taken further steps to facilitate genetic counseling for veterans: Oklahoma requires its authorities to "determine the costs of travel and medical or epidemiological tests or diagnostic procedures incurred by veterans . . . and to recommend financial compensation for any affected veteran to be provided by the [state]."¹³⁷ Although it refrains from a commitment to reimbursement for genetic counseling costs, the Oklahoma law exceeds the efforts of other states to provide genetic counseling.

Eligibility for Agent Orange genetic counseling varies across the nation. Most states provide screening and counseling only to veterans,¹³⁸ as the states define that term in their laws. Ohio, by contrast, allows "veterans and their children" to partake of available genetic screening.¹³⁹ The Ohio provision is alone in its recognition of the birth defects that dioxin exposure may cause.

B. Assistance in Processing Claims

Many states provide direct assistance to veterans in filing claims for remuneration of Agent Orange damages. California provides veterans and their dependents with support "in presenting and pursuing claims that a veteran or dependent asserts that he or she may have against the United States arising out of exposure to herbicides"¹⁴⁰ This is the most direct form of assistance among the state Agent Orange statutes, but appears to limit the advice of the state to the means of recovery from the federal government alone. Other states have established referral services by which state agencies cooperate to direct "veterans to appropriate state and federal agencies for the purpose of filing claims to remedy medical and financial problems caused by the veterans' exposure"¹⁴¹ Minnesota law provides for referral to "state, county, or veterans organizations advocacy services to assist them in filing compensation claims for disabilities that may have resulted from possible exposure."¹⁴² The terms of the Minnesota law thus allow state assistance to veterans in the prosecution of private damages actions.

In all but one state, the referral discharges the duty of the agency. Only Kansas has required maintenance of records concerning the progress of referred claims.¹⁴³

135. OHIO REV. CODE ANN. § 5903.23(C) (Page Supp. 1982) ("[t]o the extent funding is available, [the designated medical facility shall] provide veterans and their children with genetic counseling, genetic screening and any other tests considered appropriate"). Cf. H.B. 694, *supra*, note 133 ("[t]he . . . appropriation . . . shall be used to provide free genetic screening and counseling to Vietnam veterans and their children . . .").

136. See, e.g., GA. CODE § 31-30-7(a)(2) (Supp. 1982); HAWAII REV. STAT. § 321-268(2) (Supp. 1982); MINN. STAT. § 196.24 (Subd. 2) (Supp. 1983); TEX. STAT. ANN. art. 4447w, § 7(a)(2) (Vernon Supp. 1982); W. VA. CODE § 16-28-7(a)(2) (Supp. 1982).

137. OKLA. STAT. tit. 72, § 358(B)(8) (Supp. 1982).

138. See *supra* notes 130-35.

139. OHIO REV. CODE ANN. § 5903.23(C) (Page Supp. 1982).

140. CAL. MIL. & VET. CODE § 698(a) (West Supp. 1983).

141. GA. CODE § 31-30-7(a)(1) (Supp. 1982). See also HAWAII REV. STAT. § 321-268(1) (Supp. 1982); KAN. STAT. ANN. § 73-1707(a) (Supp. 1982); OHIO REV. CODE ANN. § 5903.23(D) (Page Supp. 1982); OKLA. STAT. tit. 72, § 356(A)(1) (Supp. 1982); TEX. STAT. ANN. art. 4447w, § 7(a)(1) (Supp. 1982); W. VA. CODE § 16-28-7(a)(1) (Supp. 1982).

142. MINN. STAT. § 196.22 (Subd. 2)(2) (Supp. 1983).

143. KAN. STAT. ANN. § 73-1707(a) (Supp. 1982) (referring agency must "compile data on the results of such claims and make such data a part of the report required.")

This provision ensures, at the very least, the abiding attention of the state to the plight of the veteran. In the other states, the absence of a similar requirement implies that the referral satisfies state responsibility.

C. Referral for Medical Treatment

Only three states have established programs providing referral for medical treatment. Minnesota has undertaken to "refer veterans to appropriate federal agencies or other available resources for treatment of adverse health conditions which may have resulted from possible exposure to chemical agents, including Agent Orange."¹⁴⁴ California provides for referral "for administrative and medical services."¹⁴⁵ Oklahoma law provides a more thorough referral service by mandating that the state must "determine medical, administrative and social services available to veterans exposed to . . . Agent Orange, and provide all necessary referral services."¹⁴⁶ These states thus have committed themselves to a more comprehensive referral policy.

IV. LIMITATIONS PERIODS FOR COMMENCEMENT OF AGENT ORANGE DAMAGES SUITS

Three states have adopted special statutes of limitations to govern the time at which the cause of action for recovery of Agent Orange-related damages accrues. To the dioxin-exposed population, the most generous limitations statute is that of Ohio, which provides that

a cause of action for bodily injury incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, including agent orange, arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure.¹⁴⁷

The two-year period is identical to that which applies in Ohio to other bodily injury actions.¹⁴⁸ The special period for filing of Agent Orange damages suits, however, does not begin to run until a physician informs the veteran that he or she has incurred damages caused by Agent Orange. Even if the veteran reasonably should have known beforehand that he or she had incurred Agent Orange damages, the Ohio limitations period does not commence until a physician has so advised the veteran.¹⁴⁹

New York and Rhode Island also have adopted special statutes of limitations to govern accrual of the Agent Orange cause of action. In addition to the physician-advice provision, these statutes include a reasonable-time-of-discovery rule to determine the date on which the cause of action accrues. The New York statute provides that

an action to recover damages for personal injury caused by contact with or exposure to phenoxy herbicides while serving as a member of the armed forces of the United States in Indo-China from January first, nineteen hundred sixty-two through May seventh, nineteen

144. MINN. STAT. § 196.22 (Subd. 2)(1) (Supp. 1983).

145. CAL. MIL. & VET. CODE § 698(a)(4) (West Supp. 1983).

146. OKLA. STAT. tit. 72, § 358(B)(3) (Supp. 1982).

147. OHIO REV. CODE ANN. § 2305.10 (Page Supp. 1982).

148. *Id.*

149. *See id.* § 5903.21(A)(4).

hundred seventy-five, may be commenced within two years from the date of the discovery of such injury, or within two years from the date when through the exercise of reasonable diligence the cause of such injury should have been discovered, whichever is later.¹⁵⁰

In Rhode Island, the special limitations period for recovery of Agent Orange damages is defined as follows:

an action to recover damages for personal injury caused by contact with or exposure to phenoxy herbicides while serving as a member of the armed forces of the United States in Indo-China from January first, nineteen hundred sixty-two through March twenty-ninth, nineteen hundred seventy-three, may be commenced within three (3) years from the date of the discovery of such injury, or within three (3) years from the date when through the exercise of reasonable diligence the cause of such injury should have been discovered, whichever is later.¹⁵¹

The New York and Rhode Island statutes of limitations for Agent Orange actions impose a duty of reasonable diligence on plaintiffs. Despite the currently unknown nature of Agent Orange health effects, these latter provisions may require commencement of suit prior to medical confirmation of health disorders.

V. CONCLUSION

The salutary phenomenon of state Agent Orange laws has yet to reach its full potential. Few states have included all exposed persons or all dioxin-tainted herbicides within the scope of their programs. Efforts to study self-selected veterans and to conduct epidemiological studies are subject to direct and indirect statutory limitations. Furthermore, use of the existing state bureaucracy may engulf those studies and other Agent Orange services in existing state priorities. Uncertainty of funding also discourages the attention that the Agent Orange studies may require. The leading role that the states have assumed in the Agent Orange debate behooves them to make a more substantial commitment. Indeed, to veterans of the haphazard Vietnam campaign, tentative commitments have proved worse than no commitment at all.

150. N.Y. CIV. PRAC. LAW § 214-b (McKinney Supp. 1982).

151. R.I. GEN. LAWS § 9-1-14.2 (Supp. 1983).